



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 4th day of September, 2003

Applications of

PRIMARIS AIRLINES, INC.

for certificates of public convenience and necessity under 49
U.S.C. 41102 to engage in interstate and foreign scheduled
air transportation of persons, property and mail

Served: September 4, 2003

**Dockets OST-2003-14773
and
OST-2003-14774**

**ORDER TO SHOW CAUSE
PROPOSING ISSUANCE OF CERTIFICATES**

Summary

By this order, we tentatively conclude that Primaris Airlines, Inc. (Primaris) is a citizen of the United States, is fit, willing, and able to provide interstate and foreign scheduled air transportation of persons, property, and mail, and should be issued certificates of public convenience and necessity authorizing such operations, subject to conditions.

Background

Section 41102 of Title 49 of the United States Code ("the Transportation Code") directs us to determine that applicants for certificate authority to provide interstate and foreign scheduled air transportation of persons, property and mail are "fit, willing, and able" to perform such transportation and to ensure that all operations relating to this authority conform to the provisions of the Transportation Code and the regulations and requirements of the Department. In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection. The three areas of inquiry that must be addressed in order to determine a company's fitness are whether the applicant (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have access to resources sufficient to commence operations without posing an undue risk to consumers, and (3) will comply with the Transportation Code and regulations imposed by Federal and State agencies. We must also find that the applicant is a U.S. citizen.

On March 23, 2003, Primaris filed applications in Dockets OST-2003-14773 and OST-2003-14774 requesting certificates under 49 U.S.C. 41102 authorizing it to provide interstate and foreign scheduled passenger air transportation. Primaris accompanied its applications with information required by section 204.3 of our regulations for an examination of its fitness to hold such authority.¹

We have received no answers to the applications and no special issues regarding the applicant have come to our attention. Under these circumstances, we propose to decide the issue of Primaris' fitness on the basis of the written record. As discussed below, we tentatively conclude that Primaris is a U.S. citizen and is fit, willing, and able to operate its proposed air service, as set forth in this order and subject to conditions. However, we will give interested persons an opportunity to show cause why we should not adopt as final these tentative findings and conclusions.

FITNESS

The Applicant

Primaris is a non-operating Delaware corporation that has its headquarters in Las Vegas, Nevada.² Nineteen individuals or companies currently own its stock, although there are only two shareholders--MW27, LLC, and Seventy-Six Degrees, LLC--that currently hold 10 percent or more.³ If issued the certificates it seeks, it plans to provide scheduled passenger services between major metropolitan areas in the U.S., as well as between points in the U.S., on the one hand, and points in Canada, France, and Germany, on the other; and between Boston (or, alternatively, Washington, D.C. (Dulles)) and London (Gatwick). Primaris plans to provide these services with a fleet of 100-seat 757 aircraft in first-class configuration, with its services geared toward the business traveler.

Managerial Competence

Primaris' corporate rules allow for a nine-member Board of Directors. The only person currently serving on the Board is Mark Morris, its founder and Chief Executive Officer. Mr. Morris was employed by Air One, a certificated scheduled air carrier--initially as Senior Vice President-Operations and then President/CEO--from 1980-1986. From 1977 to 1980, he was President of

¹ Primaris has supplemented its applications with additional information, most recently on May 30. In addition, on April 9, the applicant filed in Docket OST-96-1960 an accident plan as required by the Aviation Disaster Family Assistance Act of 1996. On April 24, it filed in Docket OST-98-3305 a statement summarizing how it will collect the passenger manifest information required by Part 243 of our rules (14 CFR Part 243).

² The company was incorporated in June 2002.

³ MW27 holds 66.76 percent of the shares currently outstanding. MW27 is a Delaware limited liability company whose primary shareholder (approximately 88 percent) is Mark Morris, the applicant's founder and CEO. Seventy Six Degrees, an Arizona limited liability company and family investment company managed by Kary Lewis, holds approximately 10.22 percent of the stock. Mr. Lewis serves as Secretary and Chief Financial Officer for Primaris. Primaris advises that all of its current shareholders are U.S. citizens as defined in the Statute.

DHL Air Group, which owned four airlines.⁴ From 1966 to 1975, he served in numerous capacities with Mark Aero, Inc.⁵ Since his involvement with Air One, Mr. Morris has been involved with financial capital companies--Quest Capital Corporation (Managing Director, 1986-1989), Pentastar Capital Corporation (Chairman, 1989-1995), and Universal Genesis (President, 1995-1999). Mr. Morris has been working on the development of Primaris since 1999.

Six other individuals have been designated to become Directors.⁶ These individuals include former U.S. Senator Jake Garn, who will serve as the applicant's Chairman, Neil C. Livingstone, Theodore Wallace, Donald Bliss, David Fischer, and Lew Cramer.⁷

John Pearsall is the applicant's President and Chief Operating Officer. He also holds the FAA-required position of Director of Operations. Most recently (1998-2002), he was the Manager of Pilot Training and Check Airman for National Airlines, Inc. His other employment includes America West Airlines (Boeing 757 Fleet Instructor, 1996-1998), President of Gulfstream Management Services, a corporate aircraft management business (1993-1998), and President of Red Hat Corporation, a corporate aircraft fractional ownership program (1988-1992). Mr. Pearsall holds an FAA-issued Airline Transport Pilot license.

⁴ DHL Air Cargo, DHL Airways, DHL Airlines, and Petroleum Air Transport. From 1976 to 1978, Mr. Morris was President and Chairman of Petroleum Air Transport prior to selling the company to DHL in 1978.

⁵ Mark Aero was a company owned by Mr. Morris' father. Among other aviation activities, this company owned Interstate Airlines, a certificated air carrier, and Missouri Air Commuter. It also owned a substantial interest in St. Lucia Airways. Mr. Morris began his service to the Mark Aero companies by serving as a mechanics helper and aircraft painter, but later served as General Manager of Missouri Air Commuter and St. Lucia Airways.

⁶ According to the applicant, they are expected to be formally appointed to Director positions in the near future.

⁷ All of these individuals have significant business and/or government experience. Senator Garn served in the U.S. Senate for 18 years (1975-1993) and is currently Managing Director (in Salt Lake City) for Summit Ventures, a business consulting and financial services firm. A former astronaut, Senator Garn is also currently a member of the United Space Alliance Advisory Board, a Boeing Company/Lockheed Martin Corporation joint venture responsible for the day-to-day operation and management of the U.S. Space Shuttle fleet. Dr. Livingstone is currently Chairman of GlobalOptions, Inc., a company he founded that is a global solutions and risk management company. Mr. Wallace played a key role in the development of PriceCostco, a membership warehouse company. Since leaving Price Enterprises in 1998, he has served on the Boards of various companies in the U.S. and Asia. Mr. Bliss is the former President and CEO of U.S. West Communications (Nebraska and Arizona operations) and Northwestern Bell (Southwest Region). Mr. Fischer is currently a Managing Director of Summit Ventures' Washington, D.C. office. In addition to his business experience, Mr. Fischer has held several U.S. Government positions, including U.S. Commissioner for the U.S. State Department's International Boundary Commission, a member of the U.S. Delegation to the U.N. Human Rights Commission in 1989, and Special Assistant to former President Ronald Reagan. Mr. Cramer is currently a Managing Director of Summit Ventures. He has held several positions with the U.S. Government including Assistant Secretary of Commerce for International Trade, Director General for U.S. and Foreign Commercial Service, and Deputy Assistant Secretary of Commerce.

Kary Lewis, one of Primaris' stockholders, is the company's Secretary and Chief Financial Officer. He has served in similar positions with other companies including Recovered Energy, where he is currently a part-owner and Chief Financial Officer,⁸ NextPath Environmental Services (2000-2001),⁹ and Lewis Construction Corporation (1997-2000). He was employed by Deloitte & Touche from 1986 to 1997.¹⁰

Kevin Lum is Primaris' Senior Vice President-Finance and Treasurer. Mr. Lum has previously held financial positions with other airlines, including National Airlines (1998-2002), America West Airlines (1983-1997), and Continental Airlines (1978-1983).¹¹

Michael McCracken serves as the applicant's Director of Safety and Security. Before joining Primaris, he was employed by National Airlines where he served as Flight Operations Safety Administrator (2000-2002) and Customer Service Supervisor (1999-2000).¹² Between 1991 and 1999, he served as a pilot with several airlines, including Eagle Aviation, Markair Express, and Scenic Airlines. Mr. McCracken holds an FAA-issued Airline Transport Pilot license.

Primaris' Director of Maintenance is Thomas Jasperson. Prior to joining the applicant, he was employed by National Airlines, initially as Director of Maintenance (November 1998-February 1999), then as Director of Quality Assurance (February 1999-January 2003). His other experience includes serving as Director of Technical Services (November 1995-February 1996) and Director of Maintenance (February 1996-July 1998) for Western Pacific Airlines, and over 20 years of maintenance-related positions with MarkAir, Inc. (1972-1995).¹³ Mr. Jasperson holds FAA-issued Airframe and Powerplant Mechanic and Student Pilot licenses.

James Ashpaugh is Chief Inspector for Primaris. From 1999 through 2002, he was employed by National Airlines, where he served as Manager of Technical Support and Maintenance Control

⁸ Mr. Lewis states that he intends to relinquish his role at Recovered Energy once Primaris is approved to start flight operations.

⁹ During this period, Mr. Lewis also served as interim Chief Financial Officer for NextPath's parent, NextPath Technologies, Inc.

¹⁰ His positions at Deloitte & Touche included member of its Tax Staff (1986), Tax Senior (1987-1989), Tax Manager (1990-1991), International Tax Senior Manager (1992-1995) and International Tax Partner (1995-1997).

¹¹ At National, Mr. Lum served as Vice President and Treasurer. At America West, he served as Senior Director, General Accounting (1990-1997), Director, General Accounting (1986-1990), and Manager, Disbursements (1983-1986). At Continental, he was Supervisor, Capital Assets (1982-1983), Supervisor, Accounts Payable (1981-1982), Specialist, Corporate Accounting (1980-1981), Senior Staff Accountant (1979-1980), and Staff Accountant (1978-1979).

¹² As Flight Operations Safety Administrator, he was responsible for investigating damaged equipment and personal injuries.

¹³ Managerial-level positions he held at MarkAir include: Director of Quality Control (January 1992-November 1995; November 1988-January 1990), Senior Director of Maintenance (January 1990-January 1992), Director of Maintenance (March 1986-November 1988), and Manager of Production Control (August 1984-March 1986).

(June 2001-November 2002), Line Maintenance Supervisor (May 2000-June 2001) and Mechanic/Inspector (May 1999-May 2000). Mr. Ashpaugh has held aviation maintenance-related positions since 1987 including Mountain Air Express (Mechanic, November 1996-March 1997, and Supervisor of Quality Assurance, March 1997-November 1998); Northwestern Arctic Air (Mechanic, January-April 1999); Mountain Air Cargo (Inspector, December 1995-November 1996), Aerosky (Mechanic, November 1994-October 1995), Merlin Express (Lead Mechanic, July 1994-April 1995 and November 1987-November 1991), Conquest Airlines (Training Manager, March 1993-June 1994), and Fairchild Aircraft Services (Group Leader,¹⁴ November 1991-February 1993). He holds an FAA-issued Airframe and Powerplant Mechanic license.

The Chief Pilot for Primaris is Carl Stallone, Jr. Prior to joining Primaris, he was a Check Airman and Captain for National Airlines (1999-2002). His other employment includes service as a line pilot for World Airways (1997-1999) and ValuJet Airlines (1995-1996). Mr. Stallone also served as a pilot and Chief Pilot for a Part 135 air taxi, Koro Aviation (1990-1995, 1996-1997). He holds an FAA-issued Airline Transport Pilot license and has approximately 9,700 total flight hours, approximately 7,500 of which were as pilot-in-command.

Based on the experience and qualifications of the above individuals, combined with the fact that the FAA also reviews the qualifications of certain of these individuals with respect to Part 119 and 121 of the Federal Aviation Regulations (FARs),¹⁵ we tentatively conclude that Primaris will have the management capabilities necessary to oversee its proposed scheduled passenger air transportation operations.¹⁶

Operating Plan and Financial Position

Primaris proposes to provide a comparatively low-fare, all first-class point-to-point service to high volume markets within the U.S. and between the U.S. and Canada, France, Germany, and the United Kingdom. As noted earlier, the applicant intends to use 100-seat B-757 aircraft in first-class configuration and to tailor its services to the business traveler.

Although it has not made a final decision on all of the markets it will serve, it has provided an illustrative service proposal based on markets currently under consideration. Starting with three aircraft and expanding to as many as 15 by the end of the first year of operations, the applicant's proposal calls for service between New York and eight other major metropolitan cities in the

¹⁴ This position involved supervising a number of mechanics performing various aircraft maintenance related tasks.

¹⁵ Before authorizing a carrier to conduct air transportation operations, and prior to authorizing an individual to hold the positions of Director of Maintenance, Director of Operations, Director of Safety, Chief Pilot, and Chief Inspector, the FAA evaluates the qualifications of such persons with respect to the minimum qualifications prescribed in the FARs and must approve those individuals to hold these key technical positions. The FAA has advised us that Messrs. McCracken, Jaspersen, Ashpaugh, Pearsall, and Stallone have been approved by the FAA to hold their respective positions.

¹⁶ The applicant has also provided background information on several other individuals who hold, or will hold, senior management positions. Our review of the background information provided for these persons indicates that they have relevant prior business experience.

U.S., Canada, France, and Germany, as well between Boston (or, alternatively, Washington, D.C. (Dulles)) and London (Gatwick).¹⁷ In most cases, the applicant proposes two to four daily flights in each market. In all, Primaris' initial plan anticipates the operation of approximately 26,300 block hours during the first year of operations.

Primaris has provided a detailed forecast income statement for its first year of operations. It has also submitted a projection of the expenses it expects to incur prior to commencement of operations. The applicant forecasts approximately \$14.8 million in pre-operating expenses and projects that it will incur first-year expenses of approximately \$174 million.¹⁸ We have reviewed the forecast direct operating costs and believe them to be reasonable overall. Based on the company's projections, Primaris would require approximately \$59 million to meet the Department's financial fitness criteria for all proposed aircraft.¹⁹ However, as noted in the **EFFECTIVE CERTIFICATE CONDITIONS AND LIMITATIONS** section of this order, we intend to require Primaris to provide us with updated fitness information prior to expanding its operations beyond six aircraft. Based on the applicant's forecast presented in its applications, we would estimate Primaris' funding need for its initial six aircraft to be approximately \$42.2 million.²⁰

The company's December 1, 2002, balance sheet shows that, at that date, Primaris had \$372,852 in cash, \$353,660 in working capital, a current assets-to-current liabilities ratio of 16.8 to 1, total assets of \$409,231, and net equity of \$387,039. In order to finance its operations, it intends to conduct a private offering through which it plans to raise approximately \$64 million.²¹ To this end, it has hired an investment banking firm, Crary Onthank & Co., to conduct the offering.

¹⁷ Although Primaris has requested, and been granted, confidential treatment of specific markets it is considering, the applicant's proposal for foreign authority includes, in addition to London, service to Paris, Frankfurt, and one or more large cities in Canada (such as Toronto or Montreal).

¹⁸ Primaris' forecast includes aircraft deposits of \$250,000 for each of its first three aircraft, but does not contain similar (or alternative) deposits for the remaining 12 first-year aircraft. Primaris states that, based on its discussions with potential aircraft sources thus far, it anticipates that there will be sufficient aircraft available to it, some even requiring no up-front deposits. Nevertheless, since the application includes no third-party verification that such will be the case, for purposes of our review here, we have added an additional \$3 million to the company's first-year expenses (\$250,000 x 12) to account for potential aircraft deposits. This would increase the company's first-year costs for all proposed aircraft to approximately \$177 million.

¹⁹ In establishing financial fitness, the Department typically asks an applicant to demonstrate that it has access to financial resources sufficient to cover its pre-operating expenses and the expenses that are reasonably projected to be incurred during three months of operations. In determining available resources, projected revenues are generally not included. The \$59 million noted here is comprised of the applicant's forecast of approximately \$14.8 million in pre-operating expenses plus \$44.25 million which is one-quarter of the estimated \$177 million in first-year expenses. As we note in the **PUBLIC CONVENIENCE AND NECESSITY** section of this order, we are not proposing to issue the applicant a certificate to serve between the U.S. and London, but would consider a request for exemption from Primaris should it choose to file one. The \$59 million noted here assumes that Primaris will file such an application.

²⁰ \$14.8 million in pre-operating expenses, plus approximately \$27.4 million for three months of expenses.

²¹ The offering may be either all stock or a combination of stock and debt.

Crary Onthank has provided a letter verifying that it is (along with another company, vFinance Investments, Inc.) assisting the applicant with its fundraising efforts and advises that the company has thus far obtained a commitment for \$2 million.

In light of the above, we tentatively conclude that Primaris has developed a funding plan which, if successful, will provide the applicant with sufficient financial resources to commence its proposed scheduled passenger operations without posing an undue risk to consumers or their funds.²²

Compliance Disposition

Except as discussed herein, the applicant states that there are no actions or outstanding judgments against it, persons holding a substantial interest in it, or its key personnel, and that none of these parties have been the subject of any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations, or other legal action during the past ten years. Nor are there any pending investigations, enforcement actions, or formal complaints involving the applicant, persons holding a substantial interest in it, or its key personnel regarding compliance with the Statute or any regulations or orders issued pursuant to the Statute in the past 10 years.

Primaris notes that John Pearsall, its President, Chief Operating Officer and Director of Operations, has had his FAA-issued Airline Transport Pilot license revoked twice since 1990. The first revocation, in 1992, involved findings that, on various occasions in the 1980's, Mr. Pearsall operated an aircraft under Part 91 in an unairworthy condition. The FAA also found that, on various occasions between 1989 and 1991, while President of Red Hat Corporation, Mr. Pearsall operated a business jet in air transportation without holding required Part 135 authority. In 1992, the FAA issued an emergency revocation of his Airline Transport Pilot license as a result of these violations. Prior to having his pilot's license reinstated, Mr. Pearsall acted as a second-in-command on an aircraft on one non-revenue flight.²³ As a result, his license was revoked a second time in 1994.

²² As is our practice, prior to making any authority awarded to Primaris effective, we will require the company to provide updated information demonstrating that it continues to have the financial resources needed to meet our financial test. As noted earlier, Primaris has not yet made a final determination of its initial markets. Thus, we will expect any updated information provided by Primaris to include a revised revenue and expense forecast based on its actual operating plans. In addition, it will need to provide third-party verification that it has actually received the funding needed to meet our financial test.

²³ Primaris states that Mr. Pearsall believed he was authorized to fly based on a foreign pilot certificate he held.

The applicant also advises us that, in January 2003, an Idaho court issued a \$98,804 judgment involving a financial obligation for which Kary Lewis, who holds a substantial interest in the applicant and is its Chief Financial Officer, was a guarantor.²⁴ Mr. Lewis advises that the parties are currently working on a settlement of this matter, including a release of him from any liability, and he expects the matter to be resolved within the next six months. We note that the judgment involving Mr. Lewis is relatively recent and he appears to be actively working to resolve the matter. We are aware of no other compliance-related issues involving Mr. Lewis and do not believe that this matter warrants a finding at this time that he currently has an unsatisfactory compliance posture.²⁵

The most troubling of these issues is Mr. Pearsall's past revocations of his FAA Airline Transport Pilot license. Indeed, had these actions occurred in the more recent past, it is not clear that we would find the applicant fit with Mr. Pearsall holding his positions with the applicant. However, as Primaris notes, it has been nearly 10 years since the second revocation, and since the time of these enforcement actions, Mr. Pearsall has held other airline positions, including Manager of Pilot Training for National Airlines, as well as a Fleet Instructor (B-757) for America West, without incurring any further violations. The applicant has also provided a copy of a November 2002 letter written by National Airlines' Vice President of Flight Operations, John McKeon, in which Mr. McKeon gives his highest recommendation to Mr. Pearsall, who served as Manager of Pilot Training under Mr. McKeon. We have also spoken to the FAA and been advised that that agency has a positive relationship with Mr. Pearsall, not only involving his current responsibilities with Primaris, but also his previous role with National. In light of the above, it does not appear that Mr. Pearsall currently has an unsatisfactory compliance posture.

We have found no other negative information regarding Primaris, its owners, or its key personnel. In addition, the FAA advises us that it is working with Primaris in connection with the applicant's efforts to obtain operating authority from that agency, and that the FAA knows of no reason why we should not find Primaris fit.

²⁴ Mr. Lewis advises us that, in order to close a business transaction in 2000, he agreed to remain as a personal guarantor on a financial obligation that was assumed by NextPath Technologies, a company for which he was serving as interim Chief Financial Officer. The January 2003 judgment was issued against Mr. Lewis and several other guarantors.

²⁵ Although his position was not one of those specifically discussed in the **Managerial Competence** section of this order, Vernon Bagley serves as the applicant's Senior Vice President-Strategic Applications. Mr. Bagley advises that, in 1988, the Internal Revenue Service (IRS) filed a \$6,000 tax lien against Dimensions in Travel, Inc., a retail travel agency in which he was an officer. The tax lien, involving unpaid payroll taxes for the year 1986, remains outstanding. Mr. Bagley states that, although he relied on others within the organization to remit payroll taxes as required, as Chairman of Dimensions in Travel's parent, he accepted full responsibility for the obligation and has been working with the IRS to pay it off. Mr. Bagley states that he is currently preparing an "offer and compromise" for submission to the IRS in the near future. Like Mr. Lewis, we are aware of no other compliance-related information regarding Mr. Bagley and do not believe this issue, alone, warrants a finding that neither he nor the applicant possesses a proper compliance posture.

In light of all of the above, we tentatively find that Primaris will have the proper regard for the laws and regulations governing its service to ensure that its aircraft and personnel will conform to applicable safety standards and that acceptable consumer relations practices will be followed.

CITIZENSHIP

49 U.S.C. 41102 requires that certificates to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section specifies that the president and two-thirds of the board of directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted the Transportation Code to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

As noted earlier, Primaris is a Delaware corporation. The applicant states that the only two parties holding a substantial interest in it--MW27, LLC, and Seventy-Six Degrees, LLC--are U.S. citizens.²⁶ The applicant states that all other shareholders and its key management personnel are also U.S. citizens. Primaris has submitted an affidavit attesting that it is a U.S. citizen. Finally, there is no other information before us that would lead us to conclude that Primaris is not controlled by U.S. citizens.²⁷

In view of the foregoing, we tentatively conclude that Primaris is a U.S. citizen and that, subject to certain conditions, it is fit, willing, and able to provide air transportation services as a certificated air carrier.

PUBLIC CONVENIENCE AND NECESSITY

No finding of consistency with the public convenience and necessity is required for the award of authority for interstate scheduled air transportation of persons, property, and mail under section 41102.

The award of authority to engage in foreign air transportation, however, does require a finding under section 41102 of the statute that grant of the authority is consistent with the public convenience and necessity. We tentatively find that the foreign scheduled air transportation proposed by Primaris for services to Canada, France, and Germany is consistent with the public interest. For routes on which multiple U.S. carriers may provide service, without restriction on additional entrants, it is our policy to issue certificates for indefinite duration. In this regard, we find that the proposed authority to serve Canada, France, and Germany is consistent with the aviation agreements governing air services between the United States and those countries and that those agreements allow service by multiple U.S. carriers. We, therefore, tentatively propose

²⁶ These companies are, themselves, owned and controlled by Messrs. Mark Morris and Kary Lewis, respectively.

²⁷ We note, however, that Primaris intends to obtain financing for its operations through a private placement offering of its stock, and that this offering could result in changes in the company's ownership structure. Prior to making any authority issued to Primaris effective, we will expect the company to provide us with updated information demonstrating that it remains a U.S. citizen.

to issue a certificate for service to Canada, France, and Germany of unlimited duration.²⁸ We also tentatively find that the services proposed will expand the range of price and service options available to consumers.²⁹

With respect to Primaris' request for authority to serve the United Kingdom, we are not prepared to entertain a certificate request for this authority at this time. We, therefore, will dismiss this portion of Primaris' application.³⁰

REQUEST FOR CONFIDENTIAL TREATMENT

At the time of filing its initial application, Primaris accompanied its application with a request for confidential treatment under section 302.12 of our rules for various documents contained in Exhibits PA-10, PA-11, and PA-12. By letter dated May 7, 2003, we granted the company's request, in part.³¹

In submitting additional materials on May 23 and May 30, the applicant requested confidential treatment under section 302.12 for other exhibits. The information for which the applicant seeks confidential treatment includes the following:

- Revised Exhibit PA-11 – Revised Operating Statistics
- Revised Exhibit PA-12 - List of Home Addresses/Phone Nos. for Key Personnel
- New Exhibit PAS-1 (Figures 2-8) – Additional information relative to expense forecasts
- New Exhibit PAS-2 (Attachments 1 & 2) – Information on past financing activities of the applicant's investment banking firm, Crary Onthank & Co.
- New Exhibit PAS-4 – Unredacted portions of Primaris' private placement offering document

Rule 12 instructs us to evaluate requests for confidential treatment in accordance with the standards of disclosure found in the Freedom of Information Act (5 U.S.C. 552). Information may be withheld from disclosure under 5 U.S.C. 552(b)(4) if it is (1) commercial or financial, (2) obtained from a person outside of government, and (3) privileged or confidential (*Gulf and Western Industries, Inc. v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979)).

²⁸ Given the countries that Primaris seeks to serve, it is possible that the services proposed would exceed a near-term increase in annual fuel consumption in excess of 10 million gallons, and thus, that award of such authority would constitute a "major regulatory action" under the Energy, Policy, and Conservation Act of 1975, as defined by section 313.4(a)(1) of the Department's regulations. To the extent that Primaris' service would exceed the 10 million gallon provision, we tentatively find that the additional service to be provided under this authority and resulting public benefits outweigh any adverse effects that may be caused by the increased fuel consumption.

²⁹ However, we note that, pursuant to 49 USC 41307, the issuance of foreign authority to the applicant is subject to Presidential review.

³⁰ We would, however, entertain an application for exemption authority for the proposed London authority.

³¹ On May 14 and May 30, the applicant filed redacted exhibits in the docket.

There is no question that the information for which Primaris seeks confidential treatment is financial or commercial in nature and that it was obtained from a person outside the government. The remaining question is whether the information is privileged or confidential—whether “disclosure of the information is likely to have either of the following effects: (1) impair the Government’s ability to obtain necessary information; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained” (*National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)). Further, to be privileged or confidential, the information must not be of the type that is usually released to the public (*Gulf and Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

After reviewing the applicant’s request, we find that the information for which confidential treatment is requested either is related to information for which we have previously granted confidential treatment or is beyond that normally required to be filed on the public record in fitness cases. Therefore, we have decided to grant the applicant’s May 23 and May 30 requests in their entirety.

OBJECTIONS

We will give interested persons 14 calendar days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 calendar days thereafter. We expect such persons to direct their objections, if any, to the applications and points at issue and to support such objections with detailed economic analyses.³² We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue orders that will make final our tentative findings and conclusions with respect to fitness and certification and will issue Primaris certificates that will contain exact copies of the attached Terms, Conditions, and Limitations.

EFFECTIVE CERTIFICATE CONDITIONS AND LIMITATIONS

If Primaris is found fit and issued the certificates it seeks, its authority will not become effective until the carrier has fulfilled all of the requirements for effectiveness as set forth in the terms and conditions attached to its certificates. Among other things, this includes our receipt of evidence from the FAA demonstrating that Primaris has received an Air Carrier Certificate from that agency to conduct scheduled passenger operations, evidence that Primaris has obtained liability insurance coverage meeting the requirements of Part 205 of our rules, and a statement of any

³² If an oral evidentiary hearing or discovery procedures are requested, the objector should state in detail why such a hearing or discovery is considered necessary, and what material issues of decisional fact the objector would expect to establish through a hearing or discovery that cannot be established in written pleadings. The objector should consider whether discovery procedures alone would be sufficient to resolve material issues of decisional fact. If so, the type of procedure should be specified (*see* Part 302, Rules 19 and 20); if not, the reasons why not should be explained.

changes that Primaris has undergone in its ownership, management, operations, finances, or compliance posture since the issuance of this order.³³

Furthermore, we remind Primaris of the requirements of 49 U.S.C. 41110(e). Specifically, that section requires that, once a company is found fit initially, it must remain fit in order to hold its authority. To be assured that certificated air carriers continue to be fit after effective authority has been issued to them, we require that they supply information describing any subsequent substantial changes they may undergo in areas affecting fitness.

As noted earlier, the applicant's illustrative first-year service proposal provides for it to expand from three to as many as 15 aircraft offering scheduled services within the U.S. as well as between the U.S., on the one hand, and Canada, France, Germany, and the United Kingdom, on the other, a proposal considerably more ambitious than generally put forth by new applicants for certificate authority. Notwithstanding our tentative finding of fitness for Primaris in this order, we remain cognizant of our overall responsibility to ensure the continuing fitness of certificated air carriers and, in particular, the growth of new entrant airlines. Therefore, we intend to require that Primaris provide the Department with 45-days' notice prior to implementing any expansion that would result in the operation of more than six aircraft.³⁴ This notice requirement will allow us to assess Primaris' initial operations and whether it has the appropriate infrastructure for further expansion.³⁵

Furthermore, should Primaris propose other substantial changes in areas relating to its fitness, it must first comply with the requirements of section 204.5 of our rules.³⁶ The compliance of the company with this requirement is essential if we are to carry out our responsibilities under 49 U.S.C. 41110(e).³⁷

³³ Among other things, this shall include third-party verification that the applicant has obtained financing sufficient to meet our financial fitness test.

³⁴ This limitation should take Primaris through at least the sixth month of operations as envisioned in the illustrative service proposal contained in its applications.

³⁵ The company should accompany its notice with information evidencing its continuing fitness for further expansion.

³⁶ Primaris may contact our Air Carrier Fitness Division to report proposed substantial changes and determine what additional information, if any, will be required under section 204.5. If the company fails to file the information or if the information fails to demonstrate that the carrier will continue to be fit upon implementation of the substantial change, the Department may take such action as is appropriate, including enforcement action or steps to modify, suspend, or revoke the carrier's certificate authority.

³⁷ We also remind Primaris about the requirements of section 204.7 of our rules. This section provides, among other things, that: (1) the certificate authority granted to a company shall be revoked if the company does not commence actual flying operations under that authority within one year of the date of the Department's determination of its fitness; (2) if the company commences the operations for which it was found fit and subsequently ceases such operations for any reason, it may not resume certificated operations unless its fitness has been redetermined; and (3) if the company does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

Moreover, to aid the Department in monitoring the fitness of new air carriers, we have adopted a requirement that all start-up carriers must submit a detailed progress report to the Air Carrier Fitness Division within 45 days following the end of the first year of actual flight operations. The report should include a description of the carrier's current operations (number and type of aircraft, principal markets served, total number of full-time and part-time employees), a summary of how these operations have changed during the year, a discussion of any changes it anticipates from its current operations during its second year, current financial statements,³⁸ and a listing of current senior management and key technical personnel. The carrier should also be prepared to meet with staff members of the Fitness Division to discuss its current and future operations.

ACCORDINGLY,

1. We direct all interested persons to show cause why we should not issue orders making final our tentative findings and conclusions stated above and award certificates to Primaris Airlines, Inc., authorizing it to engage in interstate and foreign scheduled air transportation of persons, property and mail, subject to the attached specimen Terms, Conditions, and Limitations.
2. We direct any interested persons having objections to the issuance of orders making final any of the proposed findings, conclusions, or the certificate awards set forth here to file such objections with the Department of Transportation Dockets, 400 Seventh Street, S.W., Washington, D.C. 20590, in Dockets OST-2003-14773 and OST-2003-14774, and serve them upon all persons listed in Attachment A no later than 14 days after the service date of this order; answers to objections shall be filed no later than 7 days thereafter.
3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.
4. In the event that no objections are filed, we will consider all further procedural steps to be waived and we will enter orders making final our tentative findings and conclusions and will issue Primaris Airlines, Inc., certificates that will contain exact copies of the attached specimen Terms, Conditions, and Limitations.³⁹
5. We dismiss that portion of Docket OST-2003-14774 to the extent that Primaris seeks certificate authority to serve the United Kingdom.
6. We grant the Motions for Confidential Treatment filed by Primaris Airlines, Inc., on May 23 and May 30, 2003.
7. We will serve a copy of this order on the persons listed in Attachment A.

³⁸ These financial statements should include a balance sheet as of the end of the company's first full year of actual flight operations and a 12-month income statement ending that same date.

³⁹ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

8. We will publish a notice of this order in the Federal Register.

By:

MICHAEL W. REYNOLDS
Acting Assistant Secretary
for Aviation and International Affairs

*An electronic version of this document is available on the World Wide Web at
<http://dms.dot.gov>*



Specimen
Terms, Conditions, and Limitations

PRIMARIS AIRLINES, INC.

is authorized to engage in interstate air transportation of persons, property, and mail between any point in any State, territory, or possession of the United States or the District of Columbia, and any other point in any of those entities.

This authority is subject to the following provisions:

(1) The authority to operate under this certificate will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:

(a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).

(b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.

(c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.

(d) A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.

(2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card) or issue tickets for the operations proposed under this certificate, and any advertisement or listing of flights by the holder must prominently state: "This service is subject to receipt of government operating authority."

(3) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(4) The holder's authority is effective only to the extent that such operations are also authorized by the Federal Aviation Administration (FAA), and comply with all applicable U.S. Government requirements concerning security.¹

(5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).

(6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

(7) The holder is authorized to conduct charter flights in interstate and/or foreign air transportation in accordance with the provisions of 14 CFR 212.

(8) In the event that the holder receives effective scheduled passenger authority, the following additional conditions will apply:

(a) The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of 49 U.S.C. 41734 and all orders and regulations issued by the Department of Transportation under that section.

(b) The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.

¹ To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served.

(9) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(l)), it must first comply with the requirements of 14 CFR 204.5.

(10) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy, unless the holder is conducting operations under another type of certificate authority. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such operations, its authority under all certificates held shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.



Specimen
Terms, Conditions, and Limitations

PRIMARIS AIRLINES, INC.

is authorized to engage in scheduled foreign air transportation of persons, property and mail over the following segments:

1. Between a point or points in the United States and a point or points in Canada;
2. Between a point or points in the United States and a point or points in France; and
3. Between a point or points in the United States and a point or points in Germany.

This authority is subject to the following conditions:

(1) The authority to operate under this certificate will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:

- (a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).
- (b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.
- (c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.
- (d) A revised list of pre-operating expenses already paid and those remaining to be paid,

as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.

(2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card), or issue tickets for the operations proposed under this certificate, and any advertisement by the holder must prominently state: "This service is subject to receipt of government operating authority."

(3) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(4) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any order of the Department of Transportation issued under them. To the extent that the holder has authority to serve more than one country or points in more than one country on the same route segment, that authority does not confer upon the holder any additional rights (including fifth-freedom intermediate and/or beyond rights) in limited-entry markets unless the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights and has notified the foreign country(ies) involved that any such selected carrier(s) has the required authority. In such cases, the fact that the carrier may hold authority to serve the countries (points) at issue on the same segment will not be considered as providing any preference to the holder in a carrier selection proceeding.

(5) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.

(6) The holder's authority is effective only to the extent that such operations are also authorized by the Federal Aviation Administration (FAA), and comply with all applicable U.S. Government requirements concerning security.¹

(7) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).

(8) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

(9) The holder is authorized to conduct charter flights in interstate and/or foreign air transportation in accordance with the provisions of 14 CFR 212.

(10) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(l)), it must first comply with the requirements of 14 CFR 204.5.

(11) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy, unless the holder is conducting operations under another type of certificate authority. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such operations, its authority under all certificates held shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(12) Any all-cargo services operated under this certificate in relation to segment 1 shall be subject to the following condition:

¹ To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served.

Points in the territory of Canada shall not be combined on any same plane scheduled or nonscheduled all-cargo courier service operated with aircraft having a maximum takeoff weight greater than 35,000 pounds.

(13) In addition to the authority granted in this certificate, the holder may also conduct operations beyond points in Canada to points in third countries that it holds authority to serve, without local traffic rights between points in Canada and such other points in third countries (*i.e.*, on a blind sector basis).

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